

An Overview of the EU Competition Rules

A general overview of the European competition rules in the areas of antitrust and cartels, merger control, State aid and liberalisation

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CONTENTS

1. Introduction	1
2. Cartels	8
3. Abuse of Dominance	10
4. Business Strategy and Commercial Agreements Generally	12
5. Horizontal Cooperation	15
6. Vertical Cooperation	17
7. Intellectual Property Licensing	18
8. Merger control	19
9. State Aid Control	21
10. State Monopolies and Liberalisation	27

Other Slaughter and May publications on the EU competition rules referred to in this publication:

- The EU competition rules on cartels
- The EU competition rules on vertical agreements
- The EU competition rules on horizontal agreements
- The EU competition rules on intellectual property licensing
- The EC Merger Regulation

1. INTRODUCTION

- 1.1 This publication provides a general overview of the competition rules applicable to companies carrying on business in Europe or whose business conduct may have effects in Europe. It identifies the broad areas where there is scope for investigations or legal proceedings under the competition rules.¹
- 1.2 The 1957 Treaty of Rome (the EC Treaty) aims to create a single market with free movement of goods and services throughout the European Union (the EU). To achieve this, it includes rules to ensure that competition within the EU is not restricted or distorted *inter alia* by cartels or anti-competitive agreements, abuses of market power, certain mergers and acquisitions or unfair state aid. These European competition rules have the force of law throughout the European Economic Area (the EEA). They are enforced by the European Commission and, in certain circumstances, by the Member States' national competition authorities (NCAs). The countries in the EEA each also have their own domestic competition rules which tend to be modelled on the EU rules.²

The general antitrust rules

- 1.3 The EU's general antitrust rules are set out at Articles 81 and 82 of the EC Treaty. Article 81(1) prohibits any agreement or concerted practice - formal or informal, written or unwritten - which is made between two or more "undertakings" (businesses), which may affect trade between Member States and which has the object or effect of preventing, restricting or distorting competition. It catches:
 - > Secret price-fixing or market-sharing cartels (as considered at Part 2 of this publication). These are viewed as serious "hardcore" infringements (i.e. *per se* violations of the antitrust rules, to use US parlance) which will almost always inevitably be condemned and not meet the exemption criteria of Article 81(3); and
 - > Other agreements between businesses if they have the object or effect of restricting competition, for example by including exclusive dealing provisions or territorial restrictions. Depending on the surrounding circumstances (and provided they are properly drafted and implemented) many business agreements of this type may nevertheless be compatible with the competition rules - either because they fall outside the scope of the Article 81(1) prohibition or because they meet the exemption criteria of Article 81(3) (see Part 4 of this publication for general observations, as well as the more specific observations at Parts 5-8 on "horizontal" agreements, "vertical" agreements, intellectual property licensing and strategic alliances and joint ventures).

¹ For more detailed guidance on how the competition rules are applied, see the various Slaughter and May publications referred to elsewhere in this publication.

² The current 25 EU Member States are Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom. Bulgaria and Romania are set to join in 2007. By virtue of the 1992 EEA Agreement, the EU competition rules also extend to 3 other countries: Iceland, Liechtenstein and Norway (sometimes referred to as the EFTA contracting states). Together the EU Member States and EFTA contracting states make up the EEA.

- 1.4 Article 82 makes it illegal for dominant companies to abuse their market power in a way which may affect trade between Member States (as considered at Part 3 of this publication). Although these special rules on unilateral market behaviour and conduct only apply to undertakings enjoying a dominant position on a relevant market, the market can be defined narrowly for these purposes.
- 1.5 Agreements caught by the Article 81 or 82 prohibitions are unenforceable and expose the parties to third party actions for damages in national courts within the EEA.³ In addition, the European Commission and NCAs can investigate and they may impose substantial fines for serious breaches (of up to 10% of worldwide group turnover in the case of Commission fines). These European competition rules apply even to conduct or agreements entered into outside the EEA if they have effects within the EEA (the “effects doctrine”).

The merger control rules

- 1.6 A new version of the EC Merger Regulation came into force on 1st May 2004 (replacing the original version adopted in 1989). It complements Articles 81 and 82 by allowing the European Commission to control certain “concentrations” (mergers, acquisitions and joint ventures) involving companies operating in Europe, as considered briefly at Part 8 of this publication. If the parties meet certain worldwide and EU-wide thresholds they must generally notify the deal to the Commission, answering a detailed questionnaire (Form CO). Also, new rules provide for the possibility of parties benefiting from this “one-stop shopping” principle in cases where the deal would otherwise be notifiable in at least three of the 25 Member States. Where a merger is not subject to notification under the Merger Regulation, national merger control regimes may instead be applicable at the Member State level.

Rules on State aid and liberalisation

- 1.7 In addition, the EU competition rules contain special rules aimed at preventing Member States from distorting competition through the grant of State aid (as considered at Part 9 of this publication). Furthermore, there are special rules applicable to State monopolies and which seek to encourage the liberalisation of markets within the EU (see Part 10 of this publication).

Enforcement of the European competition rules

- 1.8 The principal enforcement agency for the European competition rules is the European Commission, through its Directorate-General for Competition (DG Competition) based in Brussels. The NCAs also have powers to apply the European competition rules (as well as domestic competition rules) as explained below.

³ The precise rules of standing, procedure and quantification of damages vary between the Member States. If called upon to decide whether particular facts involve infringements of Articles 81 and 82, a national court is able to request guidance from the Commission. It is also possible for the national courts to refer questions to the European Court of Justice for a preliminary ruling under Article 234. In certain circumstances parties may also be exposed to damages actions elsewhere in the world, for example where the agreement also breaches US antitrust law.

1.9 The European Commissioner responsible for competition matters is currently Neelie Kroes. DG Competition is headed by its Director-General (Philip Lowe). In addition there are three Deputy Director-General positions with special responsibility for respectively (a) Mergers, (b) Antitrust and (c) State aid. Directorate A of DG Competition deals with policy and strategic support and coordination (including within the European Competition Network) and broader international relations, while Directorate R deals with strategic planning and resourcing issues within DG Competition; these two Directorates report direct to the Director-General (not via one of the Deputy Directors-General). Directorate F focuses on cartels. Directorates G, H and I deal with State aid issues. Other Commission investigations under the competition rules are carried out by Directorates B, C, D or E, each having particular areas of responsibility (with each having a unit dealing with mergers)⁴. These sectoral Directorates are organised as follows:

- > Directorate B: Energy, basic industries, chemicals and pharmaceuticals:
 - energy and water (B-1),
 - basic industries, chemicals and pharmaceuticals (B-2),
 - mergers unit (B-3);

- > Directorate C: Information, communication and media:
 - telecommunications and postal services (C-1),
 - media (C-2),
 - information industries, Internet and consumer electronics (C-3),
 - mergers unit (C-4);

- > Directorate D: Services:
 - banking, insurance and other financial services (D-1),
 - transport (D-2),
 - distributive trades and other services (D-3),
 - mergers unit (D-4);

⁴ There used to be a specialist Directorate (generally known as the "Merger Task Force") for merger control investigations. The Merger Task Force has now been disbanded and replaced by a system under which merger cases are handled by the mergers units within Directorates B to E. For details of who heads the different Directorates and units, see Commission organigram at http://europa.eu.int/comm/dgs/competition/directory/organ_en.pdf.

- > Directorate E: Industry, consumer goods and manufacturing:
 - consumer goods and food stuffs (E-1),
 - mechanical and other manufacturing industries (E-2),
 - mergers unit (E-3).

1.10 Commission decisions can be appealed to the Court of First Instance (CFI) in Luxembourg under Article 230. In turn, CFI judgments can be appealed on points of law to the European Court of Justice (ECJ).

1.11 In December 2002 the Council adopted a new Regulation on the implementation of Articles 81 and 82 (Regulation 1/2003). In March 2004 this was supplemented by a Commission Implementing Regulation (Regulation 773/2004) containing detailed procedural rules regarding complaints, the hearing of the parties, issues on confidentiality, etc. and by a package of Commission Notices providing further guidance on how the new regime should operate. These comprise:

- > Notice on cooperation within the network of competition authorities in the European Competition Network (ECN), i.e. the Commission and the NCAs in the Member States;
- > Notice on cooperation between the Commission and the courts of the Member States in the application of Articles 81 and 82;
- > Notice providing guidelines on the effect on trade concept contained in Articles 81 and 82;
- > Notice providing guidelines on the application of Article 81(3);
- > Notice on informal guidance relating to novel questions concerning Articles 81 and 82 that arise in individual cases (guidance letters); and
- > Notice on the handling of complaints under Articles 81 and 82 (which should be made using Form C as annexed to the Implementing Regulation and the Notice).

1.12 Significant elements of this regime (which came into effect on 1st May 2004) include the following:

- > The NCAs and the domestic courts are able not only to apply the Article 81(1) prohibition on anti-competitive agreements but also to declare whether the criteria of Article 81(3) are met by a particular agreement. Previously, formal exemptions under Article 81(3) could only be granted by an express decision of the Commission following the submission of a detailed notification by the parties (using Form A/B - which is now obsolete). Regulation 1/2003 replaced this old system of notification and exemption

(which tied up Commission resources in the examination of formal notifications) with a system where undertakings are encouraged to self-assess (with advisers if appropriate) whether their conduct and agreements are compatible with the principles of Articles 81 and 82.⁵ Where disputes on the application of the competition rules arise, the national courts are able to rule on the case (including on the applicability of Article 81(3)), subject to ensuring that their ruling does not conflict with a decision taken or contemplated by the Commission.⁶

- > If an NCA applies its national competition rules to an agreement or conduct where trade between Member States is affected, they are obliged (by Article 3 of Regulation 1/2003) also to apply the EU competition rules. As a result, a substantially increased proportion of Article 81 and 82 cases (in practice, the vast majority) are now handled at the NCA level rather than by the Commission. As part of this development a substantially increased proportion of NCA decisions are now based on the EU competition rules rather than solely on domestic competition rules. Generally, national competition rules should not be used to prohibit agreements that are authorised under the EU competition rules nor to authorise agreements that are prohibited under the EU competition rules. However, there remains the possibility for NCAs to apply relevant national rules on the prohibition or sanctioning of unilateral conduct where those rules are stricter than the EU competition rules.⁷ Also, Member States may continue to apply national laws where the predominant objective of those laws is different from the competition-focused objectives of Articles 81 and 82.⁸

- > There is increased cooperation between the Commission and the NCAs, including the exchange of confidential information necessary to prove an infringement of the EC competition rules. As part of the regime established under Regulation 1/2003, the European Commission and NCAs have established the ECN as a forum for discussion and cooperation for the enforcement of EC competition policy. The various authorities exchange information inter alia using a common intranet, and cooperate through the ECN structures with a view to ensuring the efficient allocation and investigation of cases. In principle the Commission (rather than the NCAs) will generally be seen as the best placed authority to deal with any case where:

⁵ There are still opportunities to approach DG Competition (or the NCAs) for guidance on the application of the competition rules to cases that raise novel questions of law or fact which cannot be easily resolved by reference to existing case-law or Commission Notices. As far as possible the Commission will provide informal guidance in such circumstances by way of a reasoned statement (a "guidance letter"), a non-confidential copy of which will be published on DG Competition's website.

⁶ The Commission has committed to assist national courts in the application of the EC competition rules by performing the role of *amicus curiae*. Member States are required to send the Commission copies of national judgments on the application of Articles 81 and 82 which the Commission then makes available on DG Competition's website.

⁷ See observations at para. 3.6 (including footnote 13).

⁸ For example this would permit the application of national legislation on unfair trading practices.

- the relevant market affected by the agreement or conduct concerns more than three Member States;
 - the agreement or conduct is closely linked to other EU rules which may be exclusively or more effectively applied by the Commission;
 - a Commission decision is needed to develop EU competition policy; or
 - it is appropriate for the Commission to act in order to ensure effective enforcement of the antitrust rules.
- > The Commission has increased powers of enforcement (including the power to take statements, to search private premises and to seal premises or business records) as well as increased powers to impose fines for procedural infringements (e.g. failure to provide information). The Commission has also been given express powers to impose structural remedies (such as breaking up a dominant company) in addition to its powers to impose fines for substantive breaches of the competition rules.

1.13 Investigations may be triggered by one or more of the parties approaching the Commission or NCAs (for example, as a “whistleblower” under the Commission’s leniency programme for cartel cases: see Part 2 of this publication), by a third party making a complaint, or by the authorities launching an inquiry of their own initiative. Complaints provide an important source of information for the Commission and the NCAs. The Commission’s principal powers of investigation include the power to require companies, wherever based in the world, to provide information (so-called “Article 18 requests/decisions”) and the power to conduct surprise inspection visits (so-called “dawn raids”) at company premises or employees’ homes within the EU.⁹

Other general points

1.14 It is important to remember that the EU’s competition rules are part of the EC Treaty which has much wider policy objectives of creating an “ever closer union” among the peoples of Europe. Given this context, any attempts by businesses to partition the EU’s “single market” or “common market” along national or other territorial lines will be viewed as serious “hardcore” infringements of the competition rules; this extends to any attempts to impose export bans within the EU or to prevent dealers from engaging in “parallel trade” (selling goods in one Member State when the supplier may have envisaged that they would have been sold in another Member State). Other “hardcore” infringements under the competition rules include price fixing (including resale price maintenance) and other market sharing agreements (e.g. customer allocation between competitors), in particular arrangements which may be characterised as cartels.

⁹ For more detailed guidance on dawn raids, see the separate Slaughter and May publication on *The EU competition rules on cartels*. The Commission’s powers to conduct investigations and dawn raids apply to any suspected infringement of Articles 81 or 82 (and not just cartels).

- 1.15 The EU competition rules apply to undertakings rather than to individuals, so employees engaged in anti-competitive practices will not be individually liable to legal action under these rules; however, criminal or other proceedings could be brought under some national rules. Moreover, companies will be held liable for the improper actions of their employees. Where employees put their company in breach of the EU competition rules, they may also be subject to disciplinary proceedings for breach of competition law compliance policies their employer may have in place.
- 1.16 DG Competition's responsibilities also extend to cooperation with other competition authorities around the world (including the US antitrust agencies). The EFTA Surveillance Authority (ESA), also based in Brussels, is a separate body with primary responsibility for enforcing the European competition rules in the three EFTA contracting states. It works closely with the European Commission; however, neither the ESA nor the NCAs in the EFTA contracting states are members of the ECN.

2. CARTELS

- 2.1 Any secret agreement or understanding between competitors which fixes prices, limits output, shares markets, customers or sources of supply (or involves other cartel behaviour such as bid-rigging) will almost inevitably be regarded as an agreement restricting competition within the meaning of Article 81.¹⁰

Serious hardcore infringements

- 2.2 Some agreements caught by the Article 81(1) prohibition are exempted provided the conditions of Article 81(3) are fulfilled.¹¹ This requires that the efficiencies flowing from the agreement outweigh the anti-competitive effects, with a fair share of those benefits flowing to consumers. Cartels, however, will generally be viewed as involving blatant “hardcore” infringements which can be presumed to have negative market effects. It is therefore almost inconceivable that a cartel agreement would satisfy the criteria of Article 81(3).

Fines

- 2.3 There has been a clear trend towards increasing fines for hardcore cartels in recent years.¹² In 2001 the Commission fined eight companies a total of €855 million for participating in various secret market-sharing and price-fixing cartel arrangements in the *Vitamins* case; the largest individual fine imposed was €462 million imposed on Hoffman-la Roche. Other recent examples of large fines imposed on cartel participants include *Plasterboard* (2002: total fines of €478 million, including a €250 million fine on Lafarge), *Carbonless Paper* (2001: total fines of €314 million, including a €184 million fine on Arjo Wiggins) and *Industrial Bags* (2005: total fines of €291 million, including a €57 million fine on UPM-Kymmene).

Leniency

- 2.4 In 2002 the Commission issued a new Notice on the non-imposition or reduction of fines in cartel cases. This Leniency Notice is aimed at further encouraging companies implicated in cartel activity to come forward and cooperate with the Commission. It is essentially based on two principles: first, the earlier companies contact the Commission, the higher the reward; second, the reward will depend on the usefulness of the materials supplied. The first case in which the Commission granted a total exemption from fines to a whistleblower was the *Vitamins* case (2001) where one member of the cartel was granted full immunity with regard to its participation in two of the cartels.

¹⁰ For more detailed guidance, see separate Slaughter and May publication on *The EU competition rules on cartels*.

¹¹ The four conditions are that the agreement (a) contributes to improving the production or distribution of goods or to promoting technical or economic progress; (b) allows consumers a fair share of the resulting benefit; (c) does not impose restrictions which are not indispensable to the attainment of (a) and (b); and (d) does not afford the possibility of eliminating competition in respect of a substantial part of the products in question.

¹² The Competition authorities have likewise been imposing higher levels of fines for other hardcore infringements of Article 81 (e.g. a Commission fine of €149 million imposed on Nintendo in 2002 for operating agreements restricting parallel trade within the EU) and of Article 82 (e.g. a Commission fine of €492 million imposed on Microsoft in 2004 for leveraging its dominant position in the market for PC operating systems).

2.5 A number of Member States have also adopted leniency programmes relating to cartel investigations. An application for leniency to one authority within the ECN is not treated as an application to any other authority. Where a company is considering making an application for leniency to the Commission, it may therefore be in its interest to make parallel leniency applications to all NCAs which have competence to apply Article 81 and which may be considered well placed to act against the cartel. There remains a risk that NCAs which have not received a leniency application or those which do not operate a leniency programme will be able to initiate an investigation of their own without the parties being protected by the leniency application made to the Commission.

3. ABUSE OF DOMINANCE

- 3.1 Article 82 of the Treaty provides that "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States".

Dominant positions

- 3.2 A dominant position is a situation of economic power held by a company which allows it to hinder the maintenance of effective competition in the relevant market by behaving to an appreciable extent independently of its competitors, customers and ultimately consumers. As a general rule of thumb, a company may be said to be dominant if it has a market share of at least 35-40%, with no other player having more than about 20%. For these purposes it is necessary to define the relevant product market as well as the relevant geographic market (which may be EU-wide, national or even local, depending on the facts).

Abusive conduct

- 3.3 Holding a dominant position is not itself unlawful. However, dominant undertakings have a special responsibility to behave in a way which does not damage or hinder the development of competition. Where a company has a dominant position, it will be in breach of the EU competition rules if it "abuses" that position.
- 3.4 Examples of unilateral conduct or behaviour which may be considered as abusive (by a dominant undertaking) include:
- > *Predatory pricing*: This term is used to describe pricing at unfairly low levels (e.g. below average variable cost), particularly if there is evidence of intent to drive a competitor out of the market;
 - > *Excessive pricing*: Unfairly high prices may be found to be abusive if they bear no reasonable relationship to the economic value of the goods;
 - > *Fidelity rebates*: Where a dominant company offers customers special financial rebates or discounts in return for securing all or an increased proportion of their business, this may be abusive if there is no objective justification, particularly if there is evidence of foreclosure effects on competitors. Rebate schemes which are linked to volumes purchased and are applied even-handedly to equivalent customers will generally not infringe Article 82;
 - > *Refusal to supply*: Article 82 requires dominant companies to have some reasonable and fair commercial reason for cutting off supplies to an existing customer. Objective justifications might include real concerns about the customer's creditworthiness or a shortage of the relevant product;

- > *Tying clauses*: Article 82 prohibits dominant companies from making the conclusion of contracts subject to supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject-matter of the contract. For example, Article 82 can prevent a dominant company from tying the supply of the product in question to a commitment to take ancillary products or services, particularly where the latter are not indispensable or where they could reasonably be provided by a third party; and
- > *Discrimination*: If a dominant company applies materially different trading terms (relating to prices or other conditions) to equivalent transactions, this may be held to be an abuse in the absence of some objective justification.

Relevance to non-dominant undertakings and other considerations

- 3.5 Relatively few companies enjoy such a position of market power that they are at real risk of being investigated under Article 82. That said, it should be borne in mind that markets can be defined narrowly for these purposes. Furthermore, where a company enjoys a significant market position, even falling short of dominance, it is also at greater risk of its market behaviour being subject to scrutiny under Article 81 if that behaviour is linked to the operation of an agreement or understanding with one or more other undertakings.
- 3.6 Unilateral conduct by companies with market power may also raise issues under national competition legislation (whether or not the conduct in question has an effect on trade between Member States). A few Member States do currently have national laws which can be applied to prohibit or remedy unilateral conduct in circumstances where there may not be an infringement of Article 82.¹³ That said, within the EU most national competition rules on unilateral conduct are closely modelled on Article 82; furthermore, under Regulation 1/2003 in any case where a NCA or national court applies national competition law to any conduct which would also be illegal under Article 82 it must also apply Article 82.
- 3.7 Non-dominant companies should also remember that they may be able to use the competition rules to their advantage. For example, if a competitor or supplier has a dominant position and uses that position to another company's disadvantage, there may be remedies available to the latter under the EU competition rules (whether involving complaints to the Commission or NCAs or through the ability to rely on Article 81 or 82 in possible domestic litigation).

¹³ Thus in Germany the provisions on discriminatory and other restrictive conduct in the GWB (Gesetz gegen Wettbewerbsbeschränkungen), in particular Section 20, can be applied with respect to unilateral conduct of companies which do not enjoy Article 82 dominance. In the UK, the Enterprise Act 2002 gives the Competition Commission powers to take action or make recommendations if it decides (following a reference from the Office of Fair Trading) that features of a market adversely affect competition; these provisions could conceivably be used in respect of unilateral conduct which would not be prohibited by Article 82.

4. BUSINESS STRATEGY AND COMMERCIAL AGREEMENTS GENERALLY

- 4.1 If a business's commercial agreements or trading terms have sufficient effects on competition in the marketplace, then they may be caught by the Article 81(1) prohibition. If so, any restrictive provisions are unenforceable (Article 81(2)) - and in serious cases the parties may risk fines - unless they meet the exemption criteria of Article 81(3). By virtue of Regulation 1/2003 (Article 2), in any national or Community proceedings for the application of Article 81(1) or 82, the burden of proving an infringement rests on the party alleging the infringement; however, any party claiming the benefit of Article 81(3) has the burden of proving that those criteria are satisfied.

Need for an appreciable effect on competition

- 4.2 An agreement will only be caught by Article 81(1) if it affects trade between Member States and if it restricts or distorts the free play of competition to an appreciable extent. This is not always easy to ascertain. It is essentially a question of fact and degree, involving identifying:
- > *Trade flows which may be affected:* If there is no appreciable effect on trade between Member States, then any competition issues should be a matter exclusively for national competition rules;¹⁴ and
 - > *The markets which may be affected by the agreement and the parties' strengths on those markets:* An agreement will not be caught if considerations such as the weak market position of the parties mean that it does not have an appreciable effect on market behaviour or on the opportunities available to third parties (customers, competitors and suppliers).
- 4.3 In appraising whether a commercial agreement is caught by the Article 81(1) prohibition, it is therefore necessary to identify the affected markets, taking account of relevant product and geographic market considerations. The Commission has issued a Market Definition Notice (in 1997) providing guidance on how it arrives at a relevant market definition for competition law purposes. The Notice emphasises that every case must be examined on an individual basis. The Commission's analysis primarily consists of reviewing a product's characteristics and intended use, taking account of the views of the parties, customers and competitors.
- 4.4 A further Commission Notice (issued in 2001) deals with the issue of appreciable effect on competition, doing this by reference to the parties' market shares on the relevant market.

¹⁴ In connection with the implementation of Regulation 1/2003, in 2004 the Commission adopted a Notice providing guidance on this issue of appreciable effect of trade between Member States (including when such effects may be considered *de minimis* such that the EU competition rules are not applicable).

This *De Minimis* Notice proceeds on the basis that agreements between actual or potential competitors are more likely to pose a threat to competition than agreements between non-competitors. Under the Notice:

- > The Commission accepts that agreements between non-competitors will generally not be caught by the Article 81(1) prohibition if the parties have market shares of no more than 15%;
 - > For agreements between competitors (or where they are difficult to classify as involving competitors or not) there is a lower 10% threshold;
 - > However, where an agreement contains “hardcore” restrictions - such as price fixing (including resale price maintenance) or territorial market sharing (including export bans or restrictions on parallel trade between EU Member States) - it is likely to be caught by the Article 81(1) prohibition even if the parties’ market shares are below the relevant 15% or 10% thresholds.
- 4.5 These thresholds in the *De Minimis* Notice are merely Commission guidelines. Vertical or horizontal agreements which exceed these limits may still not have an appreciable effect on competition and so may escape the Article 81(1) prohibition. That said, changing circumstances may mean that an agreement may subsequently be caught by the Article 81(1) prohibition: for example, if one party later merges with a competitor or if its sales of the products grow. There may therefore be good grounds for erring on the side of caution and drafting agreements to qualify for one of the Commission’s “block exemptions” (or otherwise minimising the scope for anti-competitive effects). That said, adopting a pragmatic approach may lead to the conclusion that the Article 81(1) prohibition does not apply to a particular agreement, or that the agreement is on balance pro-competitive and meets the criteria of Article 81(3). This can be significant, for example, if one party is seeking to use the competition rules as an excuse for renegeing on contractual obligations imposed by an existing agreement.

The exemption criteria of Article 81(3)

- 4.6 Even if an agreement is potentially caught by the Article 81(1) prohibition, it is not automatically prohibited. It may be pro-competitive and provide benefits to consumers. If so, it may satisfy the exemption criteria of Article 81(3)¹⁵ such that the restrictions are legally enforceable.

¹⁵ The four exemption criteria are set out in footnote 11 above.

- 4.7 Agreements complying with certain “block exemption” regulations issued by the Commission are automatically valid and enforceable (unless they involve an abuse of dominance under Article 82). Different block exemptions apply for different categories of agreements (as considered at Parts 5, 6 and 7 of this publication).¹⁶
- 4.8 Under the regime in place prior to 1st May 2004, it used to be possible for parties to apply for an “individual exemption” by notifying their agreement to the European Commission. A notification involved answering a detailed questionnaire (Form A/B) describing the parties, the agreement and the affected markets. Notifications protected the parties from the risk of fines, but did not confer provisional validity. This notification procedure was cumbersome; notifications could sit with the Commission for many months or years. Only in very important cases would the Commission go through all the legal formalities required for an individual exemption decision. Regulation 1/2003 radically reformed the way in which Article 81 is enforced (including the abolition of the notification and exemption system): agreements are automatically exempted and enforceable if they meet the criteria of Article 81(3).

Third party actions and other considerations

- 4.9 Third parties may take advantage of the competition rules by complaining to the Commission or NCAs, whether the agreement or conduct in question is already being investigated or not. They can also bring legal actions against the parties in the national courts if they suffer damage as a result of the operation of agreements which may infringe the competition rules.
- 4.10 Other issues may also affect the negotiation and operation of commercial agreements. Thus:
- > If one party enjoys a dominant position in a market affected by it, then Article 82 may also be applicable (see Part 3 of this publication);
 - > The agreement may also be caught by national competition rules (whether or not the agreement has an effect on trade between Member States). That said, within the EU most national competition rules on anti-competitive agreements are closely modelled on Article 81. Furthermore, under Regulation 1/2003 in any case where a NCA or national court applies national competition law to an agreement which may affect trade between Member States it must also apply Article 81. Indeed, national competition law cannot be applied to prohibit an agreement which affects trade between Member States but which is compatible with Article 81.

¹⁶ In addition, there are certain sector-specific block exemptions. These include the motor vehicle block exemption regulation (Regulation 1400/2002 as considered in more detail in the Slaughter and May publication on *The EU competition rules on vertical agreements*). Other block exemptions apply to certain categories of agreements in the insurance sector, air transport and maritime transport (see box in Appendix 3 to the Slaughter and May publication on *The EU competition rules on vertical agreements*).

5. HORIZONTAL COOPERATION

- 5.1 The competition authorities are generally suspicious of cooperative agreements between competitors. Some types of agreements between competitors risk being equated more to anti-competitive cartel agreements, for example information exchange agreements. That said, there are other types of “horizontal agreements” - between companies operating at the same level of trade - to which the authorities are more favourably inclined, even when they are between competitors.

The Commission’s policy on horizontal cooperation

- 5.2 In 2000 the Commission adopted new Guidelines on horizontal cooperation. These take an “effects-based” approach, recognising that where the companies involved do not enjoy market power horizontal cooperation generally does not have anti-competitive consequences. The Horizontal Guidelines complement block exemption regulations on R&D collaboration and on specialisation agreements.¹⁷

Classification of horizontal agreements

- 5.3 These Horizontal Guidelines apply to agreements where the centre of gravity of the cooperation allows them to be appraised as falling within one of the following categories of horizontal cooperation:
- > *Agreements on research and development*: The R&D block exemption (Regulation 2659/2000) encourages horizontal cooperation limited purely to joint R&D. It also permits cooperation extending to joint manufacturing and marketing (subject to a 25% market share threshold);
 - > *Production agreements (including specialisation and outsourcing)*: The specialisation block exemption (Regulation 2658/2000) permits certain types of cooperation in the field of manufacturing or marketing, subject to a 20% market share threshold and other criteria;
 - > *Purchasing agreements*: In applying Article 81(1) to joint buying agreements, relevant factors include the parties’ positions on the purchasing market concerned by the cooperation and on the downstream markets on which the parties are active. The Commission has not adopted a block exemption for purchasing agreements, but the Guidelines confirm that the Article 81(1) prohibition will generally not be triggered if the parties’ market shares are below 15%;

¹⁷ For more detailed guidance, see separate Slaughter and May publication on *The EU competition rules on horizontal agreements*.

- > *Commercialisation agreements*: Likewise, in applying Article 81(1) to joint selling and marketing agreements, relevant factors include whether the parties are in fact competitors and, if so, whether they enjoy a significant degree of market power (again by reference to a 15% threshold);
- > *Agreements on standards*: Agreements on technical or quality standards will generally be appraised favourably by the Commission;
- > *Environmental agreements*: Likewise the Commission will normally look favourably at cooperative agreements aimed at improving environmental standards within the EU.

6. VERTICAL COOPERATION

- 6.1 Companies get their goods and services to market in many different ways. Often they involve others in the process by entering into agreements with companies operating at a different level of trade. For EU competition law purposes, these are known as “vertical agreements”. Common vertical agreements include distribution and purchasing agreements, agency agreements and industrial supply contracts; a company’s agreements with its suppliers and its agreements with dealers and customers are examples of vertical agreements.

The Commission’s policy on vertical agreements

- 6.2 In 1999 the Commission adopted a block exemption regulation on the application of Article 81 to vertical agreements (Regulation 2790/1999). The Commission also adopted some Guidelines on vertical restraints in 2000. These measures adopt an “effects-based” approach, focusing not so much on the form of the vertical agreement but rather on whether it has appreciable negative effects on competition in the relevant market.¹⁸
- 6.3 Where two (or more) competing manufacturers enter into vertical-type arrangements (for example, cross-supply agreements) then Article 81(1) is more likely to apply and the stricter standards governing horizontal agreements will be relevant (see Part 5 of this publication). Where the vertical agreement is not between competitors, however, it is more likely to be appraised favourably under Article 81.

Safe harbour for vertical agreements

- 6.4 The vertical agreements block exemption only exempts vertical agreements where the market share of the relevant party (generally the supplier) does not exceed a 30% threshold. Above that level, parties will need to assess the compatibility of their vertical agreements with Article 81, with assistance from the Vertical Guidelines.
- 6.5 The block exemption is not available if an agreement includes certain “hardcore” vertical restraints, such as practices involving the imposition of resale prices on the buyer (fixed or minimum prices) and certain restrictions on resale by the buyer (including bans on cross-border sales).

¹⁸ For more detailed guidance, see separate Slaughter and May publication on *The EU competition rules on vertical agreements*.

7. INTELLECTUAL PROPERTY LICENSING

- 7.1 There are tensions between IP legislation, aimed at encouraging and rewarding innovations by protecting intellectual property rights (IPRs), and the EU's competition rules which aim to promote competition and reduce barriers to cross-border trade. Since the licensing of IPRs is brought about by means of agreements, Article 81 is the principal competition law instrument used for regulating this form of cooperation. In exceptional cases, the way in which a company exploits its IPRs may also raise Article 82 issues.¹⁹

The Commission's policy on intellectual property licensing

- 7.2 There is only one Commission block exemption dealing specifically with IPRs and that focuses on the licensing of technology (essentially patents and proprietary know-how). In 2002, however, the Commission published an Evaluation Report which may lead to clearer guidance being issued on the application of the EU competition rules to the licensing of other IPRs, including trade marks and copyright.
- 7.3 In general terms, an IP licence will only be caught by Article 81(1) if it has an appreciable effect on competition in a relevant market. IP licences between competitors are more likely to have such effects. The EU competition rules will generally also catch licences which seek to impose hardcore restrictions such as resale price maintenance or the grant of absolute territorial protection to the licensor or licensee.

The technology transfer block exemption

- 7.4 Recognising that technology licensing is generally pro-competitive, in 2004 the Commission adopted a new block exemption and a detailed set of guidelines on the application of Article 81 to technology transfer agreements (Regulation 772/2004). These replaced the previous block exemption (Regulation 240/96). The block exemption provides a blanket exemption or 'safe harbour' for all technology transfer agreements meeting certain criteria.
- 7.5 The block exemption is not available if the parties' market shares exceed a 20% threshold (for agreements between competitors) or a 30% threshold (for agreements between non-competitors). Also the agreement will fall outside the block exemption if it includes any 'hardcore' restrictions, such as price-fixing restrictions, limitations on output, allocation of markets or customers, or restrictions on the exploitation of technology (for agreements between competitors).
- 7.6 If the agreement contains certain excluded restrictions, these must be individually assessed under Article 81 but the remainder of the agreement may still be able to benefit from the block exemption. The excluded restrictions are exclusive grant-backs by the licensee, no challenge clauses and restrictions on exploiting technology (for agreements between non-competitors).

¹⁹ For more detailed guidance, see separate Slaughter and May publication on *The EU competition rules on intellectual property licensing*.

8. MERGER CONTROL

- 8.1 The principal instrument for the control of mergers and acquisitions at the EU level is the EC Merger Regulation. The current version of the Merger Regulation (Regulation 139/2004) came into force on 1st May 2004. It applies to certain “concentrations” which are treated as having a “Community dimension”, either because the parties meet certain jurisdictional thresholds or because they take advantage of opportunities granted by the Merger Regulation to notify cases to the Commission rather than to the NCAs.

The EC Merger Regulation

- 8.2 The EC Merger Regulation gives the Commission jurisdiction to control concentrations meeting the relevant jurisdictional tests. Such transactions must be notified to the Commission for investigation and approval before they may be put into effect.²⁰ Where such a transaction does not have a Community dimension, it may instead be subject to scrutiny under national merger control rules. There are also procedures which allow jurisdiction to be transferred between the Commission and the NCAs (in either direction) in certain circumstances.
- 8.3 It is important to bear in mind that the concept of “concentration” also catches various joint venture transactions provided they display structural (rather than pure behavioural) characteristics. For example, two or more companies may formalise their cooperation by establishing a new joint venture undertaking (JV), to be controlled jointly by the parent companies in accordance with a shareholders agreement. This company might take over part of its parents’ existing activities or it might be a new start-up venture. Such “full-function” JVs need to be notified to the Commission under the EC Merger Regulation if they have a Community dimension.

Application of Articles 81 and 82 to cooperative arrangements

- 8.4 JVs which do not fall under the EC Merger Regulation regime - because they are not “full-function” - may be subject to review under the general Articles 81 and 82 procedures, including possibly being able to benefit from the Commission’s block exemptions (covered at Parts 5, 6 and 7 of this publication).
- 8.5 Where a cooperative joint venture or strategic alliance is not caught by the EC Merger Regulation and does not qualify for a block exemption, the parties will need to assess whether it is caught by Article 81(1) and, if so, whether the exemption criteria of Article 81(3) are satisfied (see general considerations at Part 4 of this publication). In short, the parties should analyse whether the deal:

²⁰ For more detailed guidance on the EC Merger Regulation (including its application to certain joint ventures) see separate Slaughter and May publication on *The EC Merger Regulation*. That publication also includes a brief overview of the national merger control rules in each of the EU Member States.

- > appreciably restricts competition which there might otherwise have been between the parties (at the R&D, production/manufacturing and/or commercialisation/supply stages);
- > appreciably affects the competitive position of third parties (suppliers, customers or competitors); or
- > forms part of a wider network of cooperation between the parties or with third parties, particularly if in a highly concentrated or oligopolistic market.

9. STATE AID CONTROL

State aid as a distortion of competition

- 9.1 Where undertakings or products receive financial or other assistance from the State or other public funds, there is a risk that this favoured treatment may operate as a form of protectionism to the detriment of other undertakings or products, so disrupting normal competitive forces and threatening the EU's single market objectives. State aid may have the negative effect of delaying inevitable industry restructuring without helping the recipient actually to return to competitiveness. Instead unsubsidised undertakings, which have to compete with those receiving public support, may ultimately run into difficulties, damaging overall competitiveness and levels of employment.
- 9.2 This is why the EC Treaty's competition rules contain provisions prohibiting State aid (and similar provisions are contained in the EEA Agreement). The Commission regards the control of State aid as being one of the most important aspects of EU competition policy. It maintains a detailed State aid register with information on pending and decided cases.²¹ It also publishes regular annual surveys on State aid in the EU.

The concept of State aid

- 9.3 Article 87(1) of the EC Treaty prohibits "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods ... in so far as it affects trade between Member States", unless the aid is permitted in accordance with Treaty rules.²²
- 9.4 The "State" for these purposes includes all levels, manifestations and emanations of public authority. The concept of "aid" is very wide, encompassing anything which may be of commercial benefit. Thus, State aid can take a variety of forms, including:
- > grants or subsidies from the State or from regional or local government;
 - > tax or social security exemptions;
 - > the provision by the State (or State-controlled undertakings) of goods or services on preferential terms; or
 - > various other steps such as giving State guarantees, loans, debt write-offs or shareholdings/investments from public funds. A State aid will generally be found to exist if a Member State agrees to make funds available to an undertaking which would

²¹ See Commission website at http://europa.eu.int/comm/competition/state_aid/register/about_en.html.

²² The general EU rules on state aid are contained within the Chapter of the EC Treaty relating to competition (at Articles 86 to 89); special rules apply to the granting of aid for agricultural products (Article 36) and for transport (Article 73).

not be provided in the normal course of events by a private investor applying ordinary commercial criteria. The Commission has developed the “market economy investor principle” for such situations; this involves an examination of whether there will be an acceptable return on the provision of funds within a reasonable period of time.²³

- 9.5 There can be difficulties in applying the state aid rules to the financing of public sector obligations.²⁴ The Commission has therefore adopted certain measures relating to the payment of compensation to undertakings that perform services of general economic interest (see para. 10.5).

The Commission’s role in investigating State aid

- 9.6 There are certain circumstances in which State aid may be permitted. Article 87(2)(a)-(b) expressly permits the following forms of aid:

- (a) aid having a social character, granted to individual consumers, provided it is granted in a way which does not discriminate according to the origin of the products concerned; and
- (b) aid to make good the damage caused by natural disasters or other exceptional occurrences.

- 9.7 Article 87(3)(a)-(d) also provides that the following forms of aid may be permitted:

- (a) aid to promote the economic development of underdeveloped areas of the EU (with abnormally poor living standards or high levels of unemployment);
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or areas (provided it does not adversely affect trading conditions to an extent contrary to the common interest); and
- (d) aid to promote culture and heritage conservation (again provided it does not affect trading conditions and competition in the EU to an extent contrary to the common interest).

²³ Other guidance issued by the Commission includes a Notice published in 2000 regarding State guarantees, a 2001 Communication on short-term export credit insurance, a 1998 Notice on measures relating to direct business taxation and a 1997 Communication concerning aid elements in land sales by public authorities.

²⁴ See judgment of 24 July 2003 in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*.

9.8 The Commission has exclusive competence to decide whether or not State aid is permitted in accordance with State aid policy.²⁵ The Commission's exclusive authority for scrutinising the State aid schemes of EU governments derives from Articles 88 and 89 of the EC Treaty and from other EU legislation, including a Procedural Regulation.²⁶ Several departments in the Commission handle State aid cases, although most investigations are led by DG Competition.²⁷

9.9 Under Article 88(3) Member States are required to notify the Commission of all plans to grant aid or to alter existing approved aid schemes. A recipient of State aid cannot itself seek Commission authorisation for the aid; rather, it may need to raise with the public authorities in question the need for a notification. Notifications are required to be made through the Member States' Permanent Representations in Brussels using a standard questionnaire published by the Commission. In April 2004, the Commission adopted a new Implementing Regulation, setting out rules on notification forms, standardised reporting, the interest rate to be used for recovery of illegally granted aid and rules related to time limits.²⁸ The Implementing Regulation also includes a notification form and supplementary information sheets to be used by Member States (different forms are relevant according to the type of aid involved).

9.10 State aid can be categorised as:

- > *Non-notifiable aid*: If the aid falls within one of the block exemptions (see 9.14 below), it is not necessary to notify it to the Commission.
- > *Notified aid*: Where aid has been duly notified, the Commission will investigate. Once the Member State has submitted a complete notification, the Commission normally has two months to decide.²⁹
 - that the notified measure does not involve State aid (or is covered by a block exemption);

²⁵ Exceptionally, under Article 88(2), para. 3, the Council may (acting unanimously) decide that a specific grant of aid by a Member State is not illegal. This exceptional power was used in 2002 in respect of diesel tax subsidies granted to road hauliers in France, Italy and the Netherlands.

²⁶ Council Regulation 659/1999 codifies and extends procedural rules previously derived from case-law and Commission practice. Council Regulation 994/98 enables the Commission to adopt "block exemptions" for certain categories of aid, in which case aid is deemed compatible without the need for an individual Commission authorisation.

²⁷ Within DG Competition, three Directorates deal with State aid: Directorate G (State Aid I) deals inter alia with Regional aid and Horizontal aid (across industry sectors) and general fiscal issues; Directorate H (State Aid II) deals with Sectoral aid to particular industries; Directorate I deals with state aid policy and strategic coordination. Other Directorates-General which handle State aid cases within their areas of responsibility are DG Agriculture, DG Fisheries, DG Energy and Transport.

²⁸ Regulation 794/2004.

²⁹ If the Commission does not take a decision within two months, the Member State may implement the aid provided it gives the Commission 15 days' notice of its intention to do so.

- to authorise the aid (on the basis that there are no doubts as to its compatibility with the Treaty); or
 - to initiate a formal Article 88(2) investigation (because of doubts as to its compatibility with the Treaty).
- > *Non-notified aid*: Where a Member State fails to notify aid which should have been notified, it is illegal and should not be implemented. The Commission may investigate such situations of non-notified aid (whether following a complaint or otherwise) and may require the Member State to supply information (which may be done by way of a late notification) in connection with its investigations. The Commission will then be in a position to decide whether to authorise the aid (by not raising objections) or to open a formal Article 88(2) investigation. The Commission may also seek interim measures in such situations, pending completion of its investigations.
- 9.11 Where the Commission decides to open a formal Article 88(2) investigation procedure it sends a letter to the Member State (which will also be published in the Official Journal, C Series). During the procedure, other Member States, the recipient of the aid and other interested third parties (e.g. competitors or trade associations) have the opportunity to submit comments. The procedure should generally not take longer than 18 months; if this time limit is reached, the Member State may request that the Commission take a decision within two months. A formal investigation ends with the Commission issuing either:
- > a “positive decision” to close the proceedings and authorise the aid, in which case a letter is sent to the Member State (and published in the Official Journal, C Series). Such a decision may be made subject to conditions and obligations (a “conditional decision”); or
 - > a “negative decision” prohibiting the aid (and ordering recovery if necessary), in which case a letter and formal decision is sent to the Member State (and published in the Official Journal, L Series). Thus, the Commission has the power to require that illegally granted aid be repaid by recipients to the public authorities which granted it (with interest normally being payable from the date the aid was illegally paid). The Member State must recover the aid immediately in accordance with domestic procedures.
- 9.12 If called upon to decide whether particular facts involve illegal State aid, national courts may refer questions to the European Court of Justice for a preliminary ruling under Article 234. They may also request guidance from the Commission.³⁰ National courts should use all appropriate measures and provisions of national law to implement the direct effect of the Article 88(3) prohibition on implementation of unauthorised State aid (e.g. interim relief ordering the freezing or return of illegally paid amounts, award of damages to third parties whose interests have been harmed).

³⁰ In 1995 the Commission issued a Notice providing guidance on cooperation between national courts and the Commission in the State aid field.

Guidelines and frameworks for the application of State aid policy

9.13 Special rules and/or guidelines have been established at the EU level for the approval of State aid to particular industries, notably:³¹

- > *Agriculture and Fishing*: Various special rules apply to this sector, as explained inter alia in the Commission's 2000 Guidelines for State aid in the agricultural sector. Likewise, the Commission has issued general Guidelines for the examination of State aid to fisheries and aquaculture;
- > *Transport*: Special regimes have been established for State aid for air transport, for maritime transport and for transport by road, rail and inland waterway;
- > *Shipbuilding*: A special regime has been established for aid in the shipbuilding sector under the 2003 framework notice and Council Regulation 1177/2002;
- > *Coal and steel*: Special regimes have likewise been established for State aid to the coal and steel sectors;
- > *Electricity*: In a 2001 Communication the Commission set out criteria for the assessment of State aid aimed at compensating "stranded costs" in the electricity sector (i.e. investments, guarantees or other commitments designed to compensate for costs incurred by the electricity sector prior to its liberalisation and which cannot be recovered due to the liberalisation process);
- > *Postal services*: In 1998 the Commission adopted a notice on the application of the competition rules to the postal sector, including the application of the State aid rules;
- > *Public service broadcasting*: Given the significant number of State aid cases involving complaints from commercial broadcasters, in 2001 the Commission issued a Communication on the application of State aid rules to public service broadcasting;
- > *Audio-visual production*: In 2001 and 2002 the Commission adopted Communications relating to cinematographic and other audio-visual works.

9.14 The Commission has also adopted the following block exemptions for certain categories of "horizontal" State aid (i.e. aid which is not specific to particular industry sectors):

- > *De minimis aid*: In 2001 the Commission adopted a block exemption (Regulation 69/2001) for certain aid measures which are viewed as de minimis. In particular, the total de minimis aid granted to any one enterprise must not exceed €100,000 over any three year period;

³¹ Prior to 2004 special regimes also existed for a number of other sectors, notably synthetic fibres and motor vehicles.

- > *Aid to SMEs*: In 2001 the Commission adopted a block exemption (Regulation 70/2001 as amended) on certain aid to small and medium-sized businesses (including aid for research and development);
- > *Training aid*: In 2001 the Commission adopted a block exemption (Regulation 68/2001) on the application of the State aid rules to aid schemes and individual aid for specific or general training. Such aid must meet specified conditions;
- > *Employment aid*: In 2002 the Commission adopted a block exemption for State aid for the creation of employment or for the recruitment of disadvantaged and disabled workers (Regulation 2204/2002), provided various conditions are satisfied.

9.15 In addition, the Commission has adopted guidelines for other categories of aid where it may be willing to take a favourable approach under Article 87(3) provided proper safeguards are in place and it is satisfied that the aid will not distort competition in the EU to an extent contrary to the common interest. These guidelines include the following:

- > *National regional aid*: In 1998 the Commission issued revised and updated Guidelines on the criteria applied when examining aid to regions lagging behind in terms of development. These Guidelines are applied to regional aid schemes except where they relate to particular industries covered by special rules;
- > *Research & development aid*: The Commission has issued Guidance inter alia in the 1996 Community framework for State aid for research and development;
- > *Environmental aid*: In 2001 the Commission adopted revised and updated Guidelines on State aid for environmental protection;
- > *Rescue and restructuring aid*: In 2004 the Commission issued revised and updated Guidelines for State aid for rescuing and restructuring firms in difficulty.

10. STATE MONOPOLIES AND LIBERALISATION

The award of monopoly rights by Member States

- 10.1 The EC Treaty recognises that Member States may grant special rights, in particular monopoly rights, to public or private undertakings to perform “services of general economic interest” (“SGEIs”). Such rights have typically been granted in sectors such as postal services, rail or bus transport, electricity generation and distribution. These special rights generally correspond to responsibilities linked to the performance of a public service entrusted to the undertaking.
- 10.2 However, such special rights should not go beyond what is necessary for the performance of that service. In particular, under Article 86 of the EC Treaty they should not create situations that restrict competition. Thus EU competition law works on the basis that where an undertaking is entrusted with a monopoly which is not justified by a service of general economic interest, this may lead to high prices, poor quality service and lack of progress in terms of innovation and investment.

The separation of infrastructure from commercial activities

- 10.3 Frequently, these monopolies have been in network industries - transport, energy and telecommunications. In these sectors, a distinction can generally be made between the infrastructure and the services provided over this infrastructure. While it is often difficult to establish a second, competing infrastructure (for reasons linked to investment costs and economic efficiency), it is generally possible to create competitive conditions in respect of the services provided.
- 10.4 The Commission has therefore developed the concept of separating infrastructure from commercial activities, so the infrastructure becomes merely the vehicle of competition. While the right to exclusive ownership may persist as regards the infrastructure (e.g. the telephone or electricity network), the monopolist should grant access on reasonable terms to other undertakings wishing to compete in the provision of services via the network (e.g. telephone communications or electricity supply). This is the general principle on which EU liberalisation Directives are based.

Services of general economic interest

- 10.5 Under Article 86(1), Member States must comply with the EU competition rules -including the State aid rules - when granting special or exclusive rights to undertakings. In accordance with Article 86(3) the Commission checks that Member States comply with these rules.³² It is particularly vigilant in ensuring that where public authorities set the conditions for the performance of SGEIs, these do not go beyond what is strictly necessary for the

³² In 2005 the Commission adopted a package of measures providing greater legal certainty for the financing of SGEIs. This comprises: (i) Commission Decision 2005/842 exempting from the need to notify public service compensation (a) to undertakings with annual turnover of less than €100 million receiving annual compensation of less than €30 million, (b) to hospitals and social housing undertakings, and (c) for certain low-volume air and maritime transport services; (ii) a Commission Framework for compensation payments not covered by the Decision; and (iii) an amendment to the Transparency Directive (Directive 80/723).

performance of those services by the undertaking. The public service obligations must be clearly defined and the compensation payable should not exceed what is necessary to cover the costs incurred in the discharge of those obligations (allowing for a reasonable profit). If the undertaking is not chosen pursuant to a public procurement procedure, the level of compensation should generally be established in advance in an objective and transparent manner, by a comparison with the costs that a typical well-run and adequately equipped undertaking would incur.

10.6 Under Article 86(2) the Commission also checks that the EU competition rules are properly complied with by undertakings that have been granted special or exclusive rights. Where undertakings are entrusted by the public authorities with the performance of SGEIs, the Commission must take account of the particular tasks conferred on the undertakings in question; the application of the competition rules must not obstruct the performance of those tasks.

Liberalisation Directives

10.7 In accordance with Article 86(3) the Commission may also initiate the opening-up of markets which are served by public undertakings or undertakings to which Member States grant special or exclusive rights. It may itself adopt a European liberalisation Directive, or propose that such a Directive be adopted by the Council and the European Parliament. The objectives laid down in a Directive must then be incorporated into national legislation to be enforced by the Member States. The Commission monitors that these objectives are actually achieved.

10.8 The EU has thus introduced Directives to initiate the opening-up of the following sectors to competition:

- > Transport (air, road, rail, inland waterways);
- > Telecommunications;
- > Postal services;
- > Energy (electricity and gas).

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